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October 30, 2006
(Via E-Mail)

MSC_clerk@courts.mi.gov

Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

Re: Jury Reform Proposals
ADM File No: 2005-19

Supreme Court Clerk:

It is my privilege to contact you on behalf of the attorneys of Cummings, McClorey, Davis & Acho, P.L.C. to comment upon the proposed amendments to Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules. Our comments specifically address the proposed revisions to MCR 2.513 which has been completely rewritten and contains the most substantive proposals. This correspondence reflects the collective opinion of the numerous trial attorneys in our offices. We hope the Justices find our comments insightful and helpful when considering these important issues.

MCR 2.513 (A) Preliminary Instructions.

We overwhelmingly support this proposed amendment which would require the court to provide instruction to the jury regarding all elements of civil claims or charged offenses, as well as the legal presumptions, and burden of proof before evidence is taken. Such instruction after opening arguments would provide the jurors with neutral understanding of the legal issues in the case. Moreover, such instruction would allow the jurors to focus in on the issues and important evidence in the case throughout the course of the trial.

MCR 2.513 (E) Reference Documents.

We believe that providing the jurors with a reference notebook to assist them during the trial is an appropriate measure. Our concerns with this proposal, however, is the scope of what should be included in those notebooks. While we believe that admitted or stipulated trial exhibits would assist the jury, we believe that other materials would not. Specifically,

including witness lists may not prove helpful since in many instances not all witnesses listed are called to testify. Providing jurors with statutory provisions may prove confusing for jurors, as in most instances jurors are not trained attorneys. Further, this may interfere with the jury's obligation to accept the instruction on the law they are provided by the judge.

MCR 2.513 (F) Deposition Summaries.

We oppose the use of deposition summaries at trial in lieu of the reading of deposition transcripts or viewing of video depositions. We feel that it would be extremely difficult for summaries to capture the true nature of the testimony. Even with the opposing party having the opportunity to review and object to the contents of such a summary, we feel that it is unlikely that such summaries would be completely accurate and not phrased or prepared in a manner to favor the submitting party. Lastly, deposition summaries would disable the ability of the jury to determine the credibility of the witnesses, to the extent such credibility can be judged based upon the reading of the transcript or viewing of a video deposition.

MCR 2.513 (G) Scheduling Expert Testimony.

We oppose this amendment which is designed to allow the court to craft a procedure for presentation of expert testimony such as sequential presentation of both parties' expert witnesses and panel discussions.

Subsection (G)(1) proposes sequential presentation of the parties expert. However, this subsection is vague as it does not set forth when this presentation would be made. Additionally, sequential presentation during the plaintiff's case-in-chief assumes that all evidence underlying both expert opinions has been presented to the jury. In many instances this may not be the case as defense experts many rely on different or additional evidence in formulating their opinions. For these reasons we oppose this proposed amendment.

We favor the amendment proposed in subsection (G)(2) to allow the opposing expert to be present during the other's testimony.

We overwhelmingly oppose the proposed amendment in subsection (G)(3) relating to panel discussions by all experts. Initially, we believe that there would be numerous procedural problems with this process. It is unclear how counsel could interpose objections during this process. Additionally, if the experts are questioning each other during these discussions, they are essentially practicing law. We believe that panel discussions would be cumulative, confusing and time consuming. As stated, the rule proposes panel discussions after testimony. This would be cumulative of the expert's prior testimony. Additionally, it would allow a party to change expert testimony and case strategy in mid-stream. Experts could modify their opinions during panel discussion raising additional issues or addressing the opinions of their opponent. The proposed amendment is unclear regarding the "neutral" nature of the expert appointed by the court. Specifically, such an expert would clearly have an opinion relating to the issues in the case. It is unclear how the court could assure that this neutral expert's opinion would not be conveyed to the jury through questioning and

commentary. Further, we believe that the role of the neutral expert could actually prove confusing to the jury, especially if this expert appears to bolster the opinion of one of the parties expert. We believe the expert panel discussion process will prove time consuming as it will add an additional element to the trial. Lastly, this process would ultimately take control of trial strategy out of the hands of the attorneys and prove prejudicial to the parties.

MCR 2.513 (H) Note Taking by the Jury.

Although this provision is discretionary in nature, indicating the court "may" permit the jury to take notes regarding evidence presented, we oppose this proposal. It is our experience that even when a jury is informed they should not take notes when it may interfere with their attentiveness -- they do. The note taking process detracts from the jury's attention to the evidence presented. It interferes with their concentration. Jurors take notes regarding what they believe is the important evidence in the case to the exclusion of other evidence. Notes may be inaccurate and incomplete. Upon polling the jury after a recent Federal Court trial where note taking was allowed, we found that 80% of jurors missed critical testimony; with some jurors indicating it may have been because they were taking notes.

MCR 2.513 (H) Juror Questions.

We support this proposed amendment relating to allowing jurors to pose questions to witnesses. However, we believe that amendment should be modified to provide that all parties must stipulate to allow the court to pose the juror's question to a witness and the parties must agree to the language of the question.

MCR 2.513 (K) Juror Discussion.

We oppose this amendment which seeks to allow interim discussion of evidence by the jury prior to final presentation of evidence, instruction and argument. Although the amendment specifically provides that the discussions may only take place in the jury room when all jurors are present, our concern is that allowing interim discussion in any manner may lead to unintentional side discussions among groups of jurors regarding evidence or witness testimony. There would be no way of monitoring whether, when and how these discussions were taking place. Allowing interim discussion takes away from the context of the deliberation process by allowing jurors to assess the case in a piecemeal fashion. Ultimately, such discussions may lead to premature decision being reached on key issues in a case before the admission of all evidence.

MCR 2.513 (M) Comment on the Evidence.

We oppose this amendment allowing the court to sum up evidence and comment to the jury regarding the weight of the evidence after closing argument. Notwithstanding the high caliber of our trial court judges, we believe that it would not be possible for the court to be

100% neutral when summing up and commenting upon the evidence presented. Even if instructed not to, we believe that the juror would give great weight to the court's summation, possibly to the exclusion of their own observations or opinions. This amendment would detract from trial counsel's strategy to emphasize or diminish the weight or importance of certain evidence or testimony during closing argument.

MCR 2.513 (N) Final Instructions to the Jury.

We support the amendments proposed in subsections (2) allowing the jury to solicit questions about final instructions and subsection (3) providing written copies of jury instructions to each juror provide and believe these subsections propose appropriate procedures for assuring that the jury understands those instructions. However, we feel that all parties must have an opportunity to review the question, and address with the court any clarification prior to such clarification being provided to the jury. In some instances this may necessitate the submission of memoranda or oral argument regarding the proper clarification for the instruction.

We oppose the amendments proposed in subsection (4) relating to the jury listing issues that divide or confuse them causing impasse. To the extent the jury is confused regarding instructions, this may be addressed through submitting a question under subsection (3). Additionally, to the extent that the jury seeks to review additional evidence this may be addressed under the provisions of proposed MCR 2.513(P). To allow the jury to present issues to the court for clarification may require new evidence or additional testimony to be submitted. This procedure may infringe upon a party's trial strategy in not addressing an issue at trial or it may address issues previously resolved through motion practice. Lastly, we believe that the procedure proposed in subsection (N)(4) would ultimately lead to delay in resolution of the case.

As previously stated, we hope that these comments prove helpful in you discussions. Please feel free to contact us if you have any questions. Best regards.

Very truly yours,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

Donna A. Heiser

DAH/cab

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